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Torts - Right of Privacy - Application and Scope of the Right

Jerome J. Mack

not to offices of private corporations. The court stated further, that judgments rendered in civil actions in place of the writ of quo warranto were not completely self-executing because the statute provides that the usurper is not subject to contempt immediately for failure to comply with the judgment, but only after a demand had been made upon the usurper and after an order by the judge.

DONALD E. BJERTNESS.

TORTS — RIGHT OF PRIVACY — APPLICATION AND SCOPE OF THE RIGHT. — The right of privacy has been variously defined as the 'right to be let alone,"[1] to live a life of seclusion and to be free from public scrutiny and comment,[2] to be protected from any wrongful intrusion into one's private life which would outrage or cause mental suffering, shame or humiliation,[3] to be free from unauthorized and unwarranted publicity,[4] and to live without one's name, picture or statue being made public.[5] The right of privacy grew up as a defense against the modern techniques of transportation, communication, and publication. It is the abuse of such techniques which completely engulf an individual's personal life in the absence of legal remedy.[6] As the techniques continue to improve, so should the law progress.[7] The development of the right of privacy has had its difficulties because its need was not felt until after the common law had become well settled. Many judges, trained to rigidly apply the law as they found it, have in the past ignored the underlying traditions of Anglo-Saxon jurisprudence and have refused to recognize the right.[8] Even today a few judges maintain that position, but they are a rapidly dwindling minority.[9]

DEVELOPMENT OF THE RIGHT OF PRIVACY

At common law the action for the invasion of privacy did not exist.[10] Privacy, however, was protected in many instances, when it could be associated with some other common law action such as

1. Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).
2. See Abenathy v. Thornton, 83 So.2d 235, (Ala. 1956).
3. See Lewis v. Physicians & Dentists Credit Bureau, 27 Wash.2d 267, 177 P.2d 896 (1956).
4. See Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).
5. See Holloman v. Life Ins. Co. of Virginia, 192 S. C. 454, 7 S.E.2d 169 (1940).
6. Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 196 (1890).
7. Comment, 1952 Wis. L. Rev. 507, 520.
8. Nizer *The Right of Privacy*, 39 Mich. L. Rev. 525, 559 (1940-41).
9. Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).
10. See Elmhurst v. Shoreham Hotel, 58 F. Supp. 484 (D. C. Cir. 1945) (dictum).

defamation of character,[11] violation of a property right,[12] breach of implied contract,[13] or the breach of trust or confidential relationship.[14] The right of privacy as a separate action is of relatively recent origin, having as perhaps its first proponents Warren and Brandeis who advocated it in a Harvard Law Review Article.[15]

The first decision to allow a recovery for the invasion of privacy as an independent cause of action was rendered in 1881 in the case of *DeMay v. Roberts*,[16] where the plaintiff was allowed to recover against a physician because he allowed a non-professional, single man to witness the birth of her child without her knowledge of the fact that he was not a physician. Although the action alleged deceit, it appears that the basis for it was public policy. The court said: "It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy . . . the plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to obstain from its violation".[17]

In 1902, in *Roberson v. Rochester Folding Box Co.*,[18] the judges of the New York Court of Appeals in a four to three decision refused to enjoin the use of a living person's picture on advertising posters. The reason for the court's decision was the lack of precedent, and the fear that recognition of the right of privacy would result in a deluge of litigation and it would be impossible to prevent the doctrine from being extended step by step until it embraced all sorts of absurdities. The court relied heavily on the fact that such common law commentators as Blackstone and Kent had never mentioned the action. The court further maintained that to incorporate the doctrine in the law at this date would jeopardize

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11. Nizer, *The Right of Privacy*, 39 Mich. L. Rev. 526, 535 (1940-41).
12. Prince Albert v. Strange, 2 De G & Sm. 652, 64 Eng. Rep. 293 (1849), *Aff'd* 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849). (Queen Victoria and her consort made several etchings for their own amusement and ordered a few additional copies to give to friends. The people hired to do this made defendant obtain them, and proposed to publish and exhibit them in a catalogue, and court granted an injunction against such, on the ground that the Prince had a property right and also on the ground that there was a breach of trust).
13. Pollard v. Photographic Co., 40 Ch.Div. 345 (1888). (The defendant made unauthorized copies of a photograph and sold the picture which was placed on Christmas cards. The court granted relief based on the implied contract that the plaintiff only sat for the one photograph. The obvious fallacy of this argument (implied contract) was pointed out when the council reasoned, that a photograph taken without permission could be used because there then would be no consideration to support a claim or contract).
14. See Note 12, *supra*.
15. See Note 1, *supra*.
16. 46 Mich. 160, 9 N.W. 146 (1881).
17. *Id.*, at 148, 149.
18. 171 N. Y. 538, 64 N.E. 442 (1902).

and upset the settled principles by which the profession and the public had long been guided. The dissenting judges pointed out that legal precedent was lacking but asserted that the law should keep up with "the march of the arts and sciences".[19] This case probably produced the most vigorous controversy concerning the action that has arisen to date. The press so sharply attacked the decision that one judge, disregarding judicial custom, wrote an article defending the court's position.[20] This journalistic upheaval precipitated such unrest that the legislature of New York passed a statute[21] recognizing the right but limiting it to situations closely resembling the facts presented in the *Roberson* case. The few states that have followed the *Roberson* case base their decisions on the contention that judicial fiat should not create law, but that it should be done by the legislature.[22]

Prior to the New York legislation which recognized the right of privacy many text writers had expressed the view that if the right is to be recognized it cannot stand on legislation alone because of the rigidity of statutory language. They contend that the right of privacy must have a flexible application so that it may meet the facts and circumstances of each individual case encountered.[23] Despite this contention, New York's statute remains in effect.[24]

The first state to recognize the right independent of statute was Georgia. In the case of *Pavesich v. New England Mutual Life Co.*,[25] the court said that the fact that the common law was silent as to the existence of the right did not mean that the right was non-existent; further, if it could not be based on common law, it could have as its basis natural law. The court added that the right was implicit in the constitutional guarantees of liberty, stating that, "Liberty includes the right to live as one will . . . (and) . . . one may desire to live a life of seclusion."[26] Thus Georgia wholly re-

19. *Id.* at 449.

20. See, O'Brien, *The Right of Privacy*, 2 Col. L. Rev. 438 (1902).

21. N.Y. Civil Rights Law, §§ 50, 51 (1902).

22. Hillman v. Star Pub. Co., 64 Wash. 691, 117 Pac. 594, 596 (1911), (dictum); Prest v. Stein, 220 Wis. 354, 265 N.W. 85, 87 (1936), (dictum), (The defendant manufactured, "Franklin D. Roosevelt Cigars", using both name and picture. The court held that at common law the use of the name and portrait for advertising was not unlawful, which was not altered by statute. The defendant's action was poor taste, but not illegal).

23. See O'Brien, *The Right of Privacy*, 2 Col. L. Rev. 438, 445 (1902) ("Such a law would clearly be general enough as all penal laws should be, but it is not clear that it would be wise law or one capable of enforcement. Indeed it is quite certain that it would have to be repealed at the next session".)

24. N. Y. Civil Rights Law, §§ 50, 51 (1902).

25. 122 Ga. 190, 50 S.E. 68 (1905) (This case involved an advertisement of the value of life insurance, showing a shabbily dressed man, alongside of an easily recognized likeness of the plaintiff, over the caption, "The Man Who Does Not Own Life Insurance", plaintiff sought an injunction; the court granted it.)

26. *Id.* at 70.

pudiated the reasoning of the *Roberson* case and gave full recognition to the existence of the right as an independent action. In 1931, California following the *Pavesich* case, recognized the right, basing its decision not on natural law, but upon the constitutional right to pursue and obtain happiness.[27]

Other states have recognized the right of privacy in the absence of statute, basing their decisions not upon the constitution or upon natural law, but upon the common law itself. They maintain that "The common law, with its capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, contains within itself the resources of principle upon which relief in such a case can be founded. . . ."[28] Another court, basing its decision on the same reasoning, stated: "While the right always existed, its protection is a new doctrine in the law and may be regarded as a creation of modern common law".[29]

At the present time, the basis for recognizing the right is not uniform. There are three states that recognize the right by statute.[30] In the absence of statute the right exists in twenty-one states,[31] and the District of Columbia,[32] based either on the theory of natural law,[33] the constitution,[34] or upon common law principles.[35] Other states, have expressly refused to recognize the

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27. See Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931) (Plaintiff, an ex prostitute, had been tried and acquited of murder. Since her acquittal, she had remained and was living a virtuous life among people who knew nothing of her past. The defendant produced a motion picture, based on plaintiff's life history as revealed at trial. Court held, the incidents were of public record and not actionable, however the use of plaintiff's name is; and awarded damages basing its decision on § 1, Art. 1 of the California Constitution. "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness".)

28. Hinish v. Meier & Frank Co., 166 Ore. 628, 113 P.2d 438 (1941).

29. Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945).

30. N. Y. Civil Rights Law, §§ 50, 51 (1902) (It is limited to the use of names and pictures for advertising); Va. Code, §§ 5782 (Michie 1942); Utah Code Ann. §§ 103-4-7, 103-4-9 (1943).

31. See Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Cason v. Baskin, 159 Fla. 31, 30 So.2d 635 (1947); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Eick v. Peck Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Continental Optical Co., v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949); Bremmer v. Journal-Tribune Publishing Co., 76 N.W.2d 762 (Iowa 1956); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Hamilton v. Lumbermen's Mut. Cas. Co., 226 La. 644, 82 So.2d 61 (1956); Palles v. Crawley, Milner & Co., 332 Mich. 411, 33 N.W.2d 911 (1948); Barber v. Time, 348 Mo. 1199, 159 S.W.2d 291 (1942); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952); Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947); Frey v. Dixon, 141 N.J.Eq. 481, 58 A.2d 86 (1948); Flake v. Greensboro News Co., 212 N. C. 980, 195 S.E. 55 (1938); Friedman v. Cincinnati Local Joint Executive Bd., 6 Ohio Supp. 276, 20 Ohio 473 (1941); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941); Jenkins v. Dell Publishing Co., 143 F. Supp. 952 (W. D. Pa. 1956); Holloman v. Life Ins. Co. of Virginia, 192 S. C. 454, 75 S.E.2d 169 (1940).

32. Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D. C. Cir. 1948).

33. See Note 25 *supra*.

34. See Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

35. See Note 28 *supra*.

right.[36] The remaining states have not passed on the question either because they apparently have not had the opportunity[37] or because they have been able to aptly, "dodge" the issue.[38]

SCOPE OF APPLICATION

When the right of privacy is allowed, it is subject to certain exceptions:

1. The general public has the right to news and information[39] and if a person has been the motivating force either voluntarily[40] or involuntarily[41] in creating the situation which leads to publicity he cannot claim that his privacy has been invaded. Thus, a person who becomes an actor and creates public interest automatically emerges from his seclusion and it is permissible to publish his photograph and accounts of his activities.[42] In the case of *Bernstein v. National Broadcast Co.*,[43] the plaintiff was the victim of erroneous convictions and was subsequently pardoned. These incidents of his life were highly publicized and caused him great distress. However, he was not allowed to recover for an invasion of privacy but had to succumb to the right of the public to news, even though his publicity was definitely involuntary on his part.

2. The right is a personal one and does not survive death. In the case of *Atkinson v. Doherty*,[44] the court refused the widow of Colonel John Atkinson an injunction restraining the use of his name and portrait on a cigar label, maintaining that any right of privacy which Colonel Atkinson may have had during his lifetime did not survive his death. The court was manifestly sympathetic toward the plaintiff but stated that it is one of the ills that under the law cannot be redressed.

3. Unnatural entities such as partnerships or corporations,[45] may not maintain the action except by statute.[46]

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36. See Note 9 *supra*.

37. See Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1952); Kelly v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (4th Div. Minn. 1948); Lewis v. Physicians Bureau, 27 Wash. 2d 267, 177 P.2d 896 (1947).

38. See Themo v. New England Newspaper Publishing Co., 306 Mass. 54, 27 N.E.2d 753 (1940).

39. Bremmer v. Journal-Tribune Publishing Co., 76 N.W.2d 762, (Iowa 1956) (Iowa recognized the right as existing, but refused to allow plaintiff to recover, because the matter was one of legitimate public interest. Plaintiffs, parents of a deceased boy who had been missing a month brought action against defendant for publishing photograph of mutilated and decomposed body of the boy with news story concerning finding of body. The court stated the incident of the finding of the missing local boy was of proper public interest.)

40. See Smith v. National Broadcasting Co., 138 Cal. App. 807, 292 P.2d 600 (1954).

41. See Note 39 *supra;* Abernathy v. Thornton, 263 Ala. 516, 83 S.2d 235 (1955).

42. Jacona v. Southern Radio and Television Co., 83 So.2d 34, (Fla. 1955).

43. 129 F. Supp. 817 (D. C. Cir. 1955).

44. 121 Mich. 373, 80 N.W. 285 (1899).

45. Rosenwasse v. Ogaglia, 172 App. Div. 107, 158 N. Y. Supp. 56 (2d Dep. 1916).

46. Utah Code Ann., §§ 103-4-7, 103-4-9 (1943).

4. Creditors have certain rights to use acceptable business methods to collect from their debtors.[47] However, they must use discretion in their collection methods or they too may be liable for the invasion of privacy.[48]

5. The right may not be asserted against the government when it acts under its police power.[49] It may display photographs or fingerprints[50] if it is for the furtherance of law enforcement.

One court has indicated that the right of privacy is relative to the customs of the time and place, and it is determined by the standards of the ordinary man. The protection afforded by the right must be restricted to ordinary sensibilities. The act must be of such a nature that a reasonable man can see what might and probably will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, if he were placed in the same situation as the complainant.[51]

DEFENSES

Consent,[52] once given is a bar to the action. The right may also be lost through the doctrine of unclean hands.[53] However, truth,[54] mistake,[55] motive,[56] inadvertence,[57] or lack of malice[58] do not constitute defenses to the action.

JEROME J. MACK.

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47. Note, 31 N. Dak. L. Rev. 277 (1955).
48. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).
49. Voelker v. Tyndell, 226 Ind. 43, 75 N.E.2d 548 (1947).
50. See note 49 *supra*.
51. Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 251 (1945) (dictum).
52. Jenkins v. Dell Publishing Co., 143 F. Supp. 952 (W. D. Pa. 1956) (Plaintiff, through widow, agreed that a picture of family should become a part of the news item. Repudiation of family picture in connection with news item three months later is not invasion of privacy); see note 29 *supra*.
53. Western Union Tel. Co., v. McLaurin, 108 Miss. 273, 66 So. 739 (1914) (In this case plaintiff was denied recovery for disclosure of a telegram sent him by a prostitute).
54. See note 48 *supra*.
55. See Kerby v. Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577 (1942) (This case involved a letter addressed to plaintiff and signed by a female, which was of a for purpose of advertising a motion picture).
nature which cast doubt on plaintiff's moral character, and was circulated by defendants
56. See note 51 *supra*.
57. See note 55 *supra*.
58. See Cason v. Bakken, 155 Fla. 198, 20 So.2d 243 (1945).